Before the
Federal Communications Commission
Washington, DC 20554

In the matter of	)	
	)	
NATIONWIDE PROGRAMMATIC	)	WT Docket No. 03-128
AGREEMENT REGARDING THE	)	
SECTION 106 NATIONAL HISTORIC	)	
PRESERVATION ACT REVIEW PROCESS	)	
	)	
	)	

RESPONSE OF THE USET TRIBES TO THE PETITION FOR RECONSIDERATION FILED BY THE TOWER SITING POLICY ALLIANCE

USET Tribes:
Eastern Band of Cherokee, Mississippi Band of Choctaw, Miccosukee Tribe of Florida, Seminole Tribe of Florida, Chitimacha Tribe of Louisiana, Seneca Nation of Indians, Coushatta Tribe of Louisiana, St. Regis Band of Mohawk Indians, Penobscot Indian Nation, Passamaquoddy Tribe – Indian Township, Passmaquoddy Tribe – Pleasant Point, Houlton Band of Maliseet Indians, Tunica-Biloxi Indians of Louisiana, Poarch Band of Creek Indians, Narragansett Indian Tribe, Mashantucket Pequot Tribe, Wampanoag Tribe of Gay Head (Aquinnah), Alabama-Coushatta Tribe of Texas, Oneida Indian Nation, Aroostook Band of Micmac Indians, Catawba Indian Nation, Jena Band of Choctaw Indians, Mohegan Tribe of Connecticut, Cayuga Nation

March 23, 2005

The United South and Eastern Tribes, Inc. ("USET") respectfully requests that the Commission reject the petition for reconsideration filed by the Tower Siting Policy Alliance ("Petitioner") with regard to specific provisions adopted in the above-captioned proceeding

A. Introduction

Like the Petitioner, USET participated in the development of the Nationwide Programmatic Agreement ("NPA"), although USET's participation did not include significant involvement in the Telecommunications Working Group ("TWG"), which developed the first draft of the NPA. Like the Petitioner, there are elements in the NPA that USET agrees with and elements that USET does not agree with. However, unlike the Petitioner, USET believes that compromise is essential if the NPA is going to serve the twin purposes of carrying out the National Historic Preservation Act's mandates, as well as facilitating the development of a universal communications infrastructure. In that spirit, USET is willing to move forward under the current NPA rather than re-open its terms and engage in further wrangling over a document that has already been subject to extremely close scrutiny and review.

Since 1492, Indian tribes within what is now the United States have, as a group, lost 98% of their aboriginal land base. This percentage is even higher for the member tribes of USET, whose aboriginal lands were the first to be subsumed in the process of European settlement. Today, as a result, the overwhelming majority of tribal properties of cultural and religious significance are located off Indian Reservations and Federal trust lands. The National Historic Preservation Act (NHPA) recognizes the validity of continuing tribal concerns for the protection of both on- and off-reservation properties of cultural and religious significance and establishes extensive Federal agency tribal consultation requirements when there is a Federal "Undertaking"[1] with the potential to have any affect on tribal historic properties.

[1] A Federal "Undertaking" means "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including – (A)

As sovereign nations, Indian tribes have an inherent right and responsibility to protect and promote the welfare of their people, which includes the right to protect their cultural and religious properties and the right to be treated with respect by Federal agencies. Federal law acknowledges these rights, but Federal agencies have been reluctant to comply. For several years, USET was very concerned about the failure of the FCC to comply with Federal law when it comes to consulting with tribal governments before communication towers are constructed. However, with adoption of the NPA and the FCC-USET Best Practices, USET believes that the FCC has acted in good faith and has fully consulted with the USET tribes.

B. Early Drafting of the NPA Involved Minimal Tribal Involvement

In its original conception and design, the NPA was the product of the Telecommunications Working Group ("TWG"), an entity which consisted primarily of representatives of the Federal Communications Commission, the Advisory Council on Historic Preservation, the National Council of State Historic Preservation Officers and the communications industry. Although the Petitioner describes the Telecommunications Working Group ("TWG") as including "American Indian Tribes", and the draft NPA as being "the product of hundreds of hours of discussion, give-and-take negotiation and compromise by representatives of a wide range of interests [including]…Indian tribes" with "[e]very provision … agreed to by group consensus, after being reviewed and reconfirmed multiple times," *this is not the case*. Petition for Reconsideration, pp. 5-6.

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those carried out by or on behalf of the agency; (B) those carried out with Federal financial assistance; (C) those requiring a Federal permit, license, or approval; and, (D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." 16 U.S.C. 470w(7).

It is false and misleading for the Petitioner to assert that the original draft NPA, which established the framework for the document that was eventually approved by the Commission, was developed with tribal approval. The truth is that USET has had to "row against the tide" resulting from the advanced development of a draft NPA with virtually no tribal input. This is significant because, as even the Petitioner acknowledges, "[w]hen the NPA was released on September 24, 2004, it contained many of the same provisions from the TWG NPA and the draft NPA released with the *Notice*." Petition for Reconsideration, p. 6.

USET did make two attempts to participate in the TWG when it finally learned of its existence. One USET representative, Ken Carleton, the Tribal Historic Preservation Officer for the Mississippi Choctaw, learned of the TWG, contacted them, and received the then-current draft of the NPA – it was titled "Draft No. 9." When Mr. Carleton subsequently attempted to participate by telephone in a TWG meeting, where he raised tribal issues; he was treated dismissively by the apparent coordinator of that meeting, who now serves as lead counsel for the Petitioner. A second USET representative, the late Bill Day, who served at that time as the Chairman of the USET Culture and Heritage Committee, attended two meetings but when he realized that the parties had already reached major decisions without tribal input and had limited interest in tribal views, he withdrew indicating that USET would invoke the tribal right of direct consultation with the FCC, which the FCC subsequently carried out fully.

The Nationwide Programmatic Agreement, like most compromises, leaves everyone a little unhappy. USET did not get all that it sought in the Nationwide Programmatic Agreement. Notably, USET pushed hard for Alternative B under Part IV of the NPA ("Participation of Indian Tribes and Native Hawaiian Organizations in

Undertaking Off Tribal Lands"). Alternative B was not adopted. USET objected strongly to repeated references to the Collocation Agreement, which USET considers to have been adopted without proper consultation with tribes. The Collocation Agreement is prominently mentioned in the NPA. USET supported a change in the definition of "tribal lands." That change was not incorporated into the NPA. Notwithstanding that USET did not secure everything it wanted, USET was fully consulted by the FCC on the NPA and accepts that it represents a pragmatic compromise of interests.

C. Archaeological Field Surveys - How Do You See Without Looking?

The Petitioner complains about the frequency with which it will have to conduct archaeological field surveys under the NPA. However, as the Petitioner acknowledges, "in most cases the only way to determine if soils at a site are 'cultural resource-bearing' is to perform intrusive below-ground testing to see if the soils actually bear cultural resources." Petition for Reconsideration, pp. 7-8. And therein lies the conundrum of the Petitioner's position – they want an exclusion from the only archaeological tool that can provide a universally accepted answer as to whether a historic property will be affected by a particular action. Indeed, many companies are now routinely performing these surveys.

Although the Petitioner shows scant regard for the FCC's finding that few tribal properties are listed on the National Register of Historic Places, in fact, few tribal properties are listed on the National Register of Historic Places. This fact can be confirmed by simply perusing the National Register. In this context, the FCC correctly concluded that extra caution was necessary with regard to tribal historic properties.

USET actually recognizes that there are some situations where an archaeological field survey is not sensible. USET included several

such situations in the FCC-USET Best Practices. Although that document also discusses the need for an archaeological field survey, it provides for a tribe and a company to negotiate other requirements that may not necessarily include such a survey. It would behoove companies to contact tribes prior to taking any action on a site(s). Tribes will frequently be able and willing, once a relationship has been established, to indicate areas of concern and areas where the Tribe has little or no interest. As a result, tribes may agree that no Phase I survey is necessary in certain cases or circumstances. However, if there has been no such advance agreement, a Phase I survey is the only universally accepted way a tribe can properly evaluate its interests in a site. Tribes should always have a right to see a Phase I survey.

The cost of a survey is most cases should be less than 1% of the overall cost of the tower. Of course, the destruction of a sacred site cannot be measured in monetary terms.

D. The Exemption for Tribal Participation from Certain Exclusions is Wholly Consistent with the Mandates of the NHPA

While acknowledging on the one-hand the unique status of Indian tribes, the Petitioner on the other hand appears to argue that that unique status should not result in any actual difference in how tribal interests are treated. However, the mandates of the NHPA, as well as general principles of Federal Indian law, provide for special protection for tribal interests. That special status is appropriately reflected in the NPA. Moreover, the Petitioner overlooks the benefit of working with tribes. Without a tribe's unique expertise in its cultural and religious history, it is impossible for cell tower companies to properly evaluate the historic significance of a proposed Facility, or its potential impact on, properties of cultural and religious significance to a particular affected tribe.

The National Historic Preservation Act (NHPA) provides protection for "districts, sites, buildings, structures and objects significant in American history, architecture, archeology, engineering, and culture." *16 U.S.C. Section 440(f)*. The NHPA does this by requiring federal agencies engaged in a "federal undertaking" to "take into account the effect" the undertaking may have on historic properties "included", or "eligible for inclusion" in the National Register of Historic Places. *Id*. In the absence of a programmatic agreement such as the NPA, the NHPA is implemented through a complex regulatory scheme (the Section 106 process), which requires federal agencies to collect information concerning a particular site's eligibility for the National Register, potential adverse effects the undertaking may have on the site, and ways to mitigate adverse effects. *See 34 C.F.R. Part 800*.

The NHPA sets forth two distinct requirements with regard to Tribes. First, the NHPA obligates a Federal agency to evaluate its undertakings for their impact on tribal historic properties. *16 U.S.C. 470a(d)(6)(A).* In carrying out this obligation, a Federal agency would, in most cases, need to secure the cultural and religious expertise of any Tribe whose historic property could be affected in order to properly evaluate the impact of that undertaking on that Tribe's historic property.

Second, a Federal agency is obligated to seek official tribal views on the effect of an undertaking, a distinct exercise from securing the Tribe's cultural and religious expertise for evaluating the impact of an undertaking. Specifically, the NHPA provides that federal agencies "shall consult with any Indian tribe and Native Hawaiian organization that attaches religious or cultural significance" to properties that might be affected by a federal undertaking. 16 U.S.C. Section 470a(d)(6)(B) (emphasis added). The NHPA tribal consultation requirement applies broadly to traditional religious and cultural properties of Native Americans and Native Hawaiians, and makes no distinction with respect to tribal religious or cultural properties located on or off tribal lands.

Of course, general principles of Federal Indian law recognize Tribal sovereignty, place Tribal-US relations in a government-to-government framework, and establish a Federal trust responsibility to Indian tribes. These general principles are rooted in such sources as the U.S. Constitution (Art. I, Section 8), Federal case law, Federal statutes (including the National Historic Preservation Act, the Native American Graves Protection and Repatriation Act,[2] the American Indian Religious Freedom Act,[3] and the Archaeological Resources Protection Act[4]), Presidential Executive Orders (including Executive Order 13007—Indian Sacred Sites, and Executive Order 13175—Consultation and Coordination with Indian Tribal Governments), regulations, and case law, as well as the Advisory Council on Historic Preservation's policy statement *The Council's Relationship with Indian Tribes* and the FCC's *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*.

The Federal Courts have developed canons of construction that are used to interpret Indian treaties and statutes relating to Indians. The fundamental component of these canons of construction is that treaties and statutes are to be liberally interpreted to accomplish their protective purposes, with any ambiguities to be resolved in the favor of the Indian tribes or individual Indians. See *Alaska Pacific Fisheries Co. V. United States*, 248 U.S. 78, 89 (1918) ("the general rule [is] that statutes passed for the benefit of the dependent Indian tribes or communities are to be liberally construed, doubtful expressions being resolved in favor of the Indians"); *Tulee v. Washington*, 315 U.S. 681, 684-685 (1942); *Carpenter v. Shaw*, 280 U.S. 363 (1930); *McClanahan v. Arizona State Tax Com'n*, 411 U.S. 164 (1973).

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[2] Pub. L. No. 101-601, Section 2, 104 Stat. 3048 (1990)(codified at 25 U.S.C. Sections 3001-13 (Supp. III 1991).

[3] Pub. L. No. 95-341, Section 1, 92 Stat. 469 (1978)(codified at 42 U.S.C. Section 1996 (1988).

[4] Pub. L. No. 96-95, Section 2, 93 Stat. 721 (1979)(codified at 16 U.S.C. Sections 470aa-70mm (1988).

Consistent with these principles, the National Historic Preservation Act should be read broadly to support and protect tribal interests. The NPA's tribal provisions are in accord with these doctrines.

E. Tribal Exceptions to Certain Exclusions are Rational and Justified

The Petitioner argues that tribe's should not enjoy an exception to two exclusions – rights of way and industrial/commercial areas. The Petitioner argues that tribes should not be treated differently than other interests even though, as described above, tribes have a different, elevated status under the law.

The Petitioner also argues that the exclusions are intended to address areas where it is somehow possible to make an advance determination that there is minimal possibility of an adverse impact. Although this line of reasoning sounds plausible if such an advance determination can be made, it makes little sense when applied, for example, to rights of way. The rights of way exclusion applies to land within 50 feet of the outer boundary of rights of way for the location of communications towers or above-ground utility transmission lines (themselves as much as 200 feet wide), which frequently are aligned with Interstate highways, major roads and railway corridors. These are huge swaths of land that, in many cases, have been built, not coincidentally, on top of ancient Indian trails and trade routes, frequently crossing areas of dense Indian habitation. The European explorers, contrary to their own myth, did not "discover" an untamed wilderness. Millions of Indians lived within the continental United States in 1492, when Columbus inadvertently bumped into this continent. They had developed complex societies and complex economies. They developed substantially and heavily traveled trade routes. These routes tended to follow natural geographic features (flat lands, mountain passes, along rivers, etc.). The earlier settlers took advantage of the existing trails and, over the years,

built thereon the vary transportation (and transmission) routes which are now the basis of this exclusion.

There is also an assumption in Petitioner's argument that once an area has been disturbed, further disturbance does not make any difference. This is patently untrue. Additional activity can cause further disturbance. One tower on a sacred mountain is disruptive. Two towers are more so. USET has discussed this matter with its member tribes and has learned that in many cases the construction of railroad tracks and roads often involves building up areas and this activity has actually resulted in the encapsulation and therefore protection of tribal sites. The Narragansett Tribe reports that they frequently uncover areas of cultural and religious importance to them in railroad embankments and beds. The Historic Preservation Officer for the Mississippi Choctaw, Kenneth H. Carleton, reports a situation in Mississippi where an old railroad grade protected an extensive prehistoric cemetery that included over 150 burials. In these cases, subsequent development could destroy what has, serendipitously, been protected.

The NPA exclusions are motivated by the communication industry's desire to speed its construction process. USET wants industry to achieve its goals, but not at the expense of tribal sacred sites or fundamental principles in the NHPA. Over the years, tribes have been frequently told that a federal policy will have a "de minimus" or even positive impact on tribes. Frequently, as in the position advocated by the Petitioner, the proposed policy would greatly benefit non-Indian interests. Only later does it become clear that tribes have sacrificed greatly for nothing in return.

F. Confidentiality Standards Should Protect Both Tribes and Industry

USET supports strong confidentiality standards for both tribes and industry. Tribes support strong confidentiality standards because of a recurring tribal experience – every time a tribal site becomes public knowledge, professional looters move in to collect Indian artifacts for sale to an international black market in these items. Without strong confidentiality provisions, which we believe are also in the interest of industry, there is a great risk that the effort to save sites will lead to the loss of sites.

G. Conclusion

In its Indian policy statement, the FCC commits to "endeavor to identify innovative mechanisms to facilitate tribal consultations in the Commission's regulatory processes; and endeavors to streamline its administrative process and procedures to remove undue burdens that its decisions and actions place on Indian tribes." The NPA and the FCC-USET Best Practices provide exactly the kind of mechanisms envisioned in the FCC policy statement. USET applauds the FCC for its work on the NPA and Best Practices and urges the Commission to reject the Petitioner's Petition for Reconsideration.